outside party, or the stockholder is the complaining party. It seems a departure from the conception of the corporation as an entity deriving all its power and authority from the sovereign, and regards the corporation rather as an association exercising by permission the prerogatives of an artificial person.

AIDER BY VERDICT IN CRIMINAL CASES.—The New York Court of Appeals has recently held that an indictment which does not allege facts constituting a crime will be good after verdict and judgment provided the defendant fails to object in the manner prescribed by the Code and provided the facts necessary to constitute the crime intended to be charged appeared upon the trial. *People* v. *Wiechers* (1904) 179 N. Y. 459.

The principle of aider by verdict is of ancient application at common law in civil cases, *Skinner* v. *Gunton* (1681) 1 Wms. Saund. 228; *Ladd* v. *Pigott* (1885) 114 Ill. 647, and is an exception to the general rule that a declaration which does not state a cause of action cannot be cured by verdict. *Chichester* v. *Vass* (Va. 1797) 1 Call 71; *Dale* v. *Dean* (1844) 16 Conn. 579. It has been suggested that this exception originally had no application to criminal cases in England, *King* v. *Mason* (1788) 2 D. & E. 581; but this is doubtful, *Hancock* v. *Baker* (1800) 2 B. & P. 260, and in a modern case, *Heyman* v. *Queen* (1873) 12 Cox C. C. 383, it was held that an indictment which did not charge a crime could be aided by a verdict rendered upon proof of all the necessary facts. This represents the English law to-day. Since both at common law, 1 Bouv. Law Dict. 1018, and by statute, an instrument which does not charge a crime is not an indictment, *People* v. *Dumar* (1887) 106 N. Y. 502, these English cases can be supported only by holding that the right to trial upon indictment may be impliedly waived. If the right cannot be waived, neither may it be said that facts appearing on the trial will relate back to and cure a merely colorable indictment, since a fiction is never invoked to work a wrong. Purely personal rights granted by statute or common law are held to be susceptible of waiver unless some question of public policy intervenes, *Matthew's Case* (1868) 18 Gratt. 989, but in England the right to a trial by equals was held to be incapable of waiver because secured by Magna Carta. *Lord Dacre's Case* (1535) Key. 56; 2 Wooddeson, Lectures 581. The requirement that trials shall be upon indictment is generally found in the constitutions in this country, and while all constitutional rights are not incapable of waiver, it seems that they must clearly appear to be only personal privileges for this to be allowed. *Cancemi* v. *People* (1858) 18 N. Y. 128; see *Edwards* v. *State* (1883) 45 N. J. L. 419. The New York Constitution Art. I, Sec. 6, provides in mandatory language that "No person shall be held to answer for a crime unless on presentment or indictment," while, by contrast, the language of other clauses in the same section seems more nearly permissive, and in Mississippi, under a similar constitutional provision, the court held that this right could not be waived. *Newcomb* v. *State* (1859) 37 Miss. 383.

It would seem that the constitutional restriction goes to the jurisdiction of the court, and jurisdiction cannot be broadened by any act

of the parties. *Everly* v. *Moore* (1860) 24 How. 147; compare *Lavery* v. *Comm.* (1882) 101 Pa. St. 560. Before the adoption of the present Code of Criminal Procedure in New York the objection that no crime was charged in the indictment could be taken for the first time in the appellate court, *Fellinger* v. *People* (1863) 15 Abb. Prac. 128, and this without any assignment of error. 2 Rev. St. p. 741, § 23. Sec. 515, Code of Crim. Proc., substitutes the appeal for the writ of error. Sec. 331 provides that all of certain objections, enumerated in Sec. 323, may be taken only on demurrer, except objections to the jurisdiction of the court and the sufficiency of the indictment, which may be taken at the trial, under a plea of not guilty, and in arrest of judgment. As a matter of interpretation there is nothing either in Sec. 331 or Sec. 323 requiring for them an interpretation that the right existing under the former statute is now excluded, but if there is, an indictment which does not charge a crime is so faulty that it cannot be cured by amendment; *People* v. *Mahoney* (1903) 88 App. Div. 294; that is, before conviction a new indictment must be found, and any judgment by the court on the faulty indictment would be without the jurisdiction to which it is confined by the Constitution. Such a judgment is void—it may be attacked at any time and collaterally—*Dicks* v. *Hatch* (1860) 10 Iowa 380, and to interpret Sec. 331 as allowing this objection to be taken only at the times named would give it an interpretation repugnant to the Constitution.

The principal case finds direct support in *State* v. *Malish* (1895) 15 Mont. 506, and in *State* v. *Hinckley* (1895) 4 Idaho 490, following the Montana court; but in neither of these cases nor in the principal case was the constitutional question raised, and that consideration would seem to require the conclusion reached in *Newcomb* v. *State*, supra. See *State* v. *Meyers* (1889) 99 Mo. 107; *Moore* v. *People* (1888) 26 Ill. App. 137.

Damages and Profits in Actions for Infringement of Trade Mark or Trade Name.—The Circuit Court of Appeals has recently indicated that the proper measure of damages in cases of infringement of trade mark or trade name is the profit which the plaintiff would have made by the sale of the same quantity of the genuine goods as the defendant has sold of the spurious. *Walter Baker & Co.* v. *Slack* (1904) 130 Fed. 514.

If the court intended to lay down the rule above stated as a general one, it seems difficult to sustain it either on principle or on authority. It is believed that no decided case has gone to the length there suggested and it is not clear on what ground such a decision would be sustainable. To assume that every sale by the defendant was the loss of a sale to the plaintiff would be to violate the basic principle that the plaintiff is entitled to only such damages as he can prove; and no such assumption will be indulged by the courts. *Leather Cloth Co.* v. *Hirschfield* (1865) L. R. 1 Eq. 299; *Atlantic Milling Co.* v. *Rowland* (1886) 27 Fed. 24; *Shaw & Co.* v. *Pilling & Son* (1896) 175 Pa. St. 78. Nor is the court's position strengthened by saying that since the plaintiff's loss rather than the defendant's gain should be the measure of damages, the plaintiff's profit on the sale of an